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# In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 414

CHATTANOOGA BAKERY, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court below (R. 986–992) is reported at 127 F. (d) 201. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 17–94) are reported at 25 N. L. R. B. 397.

### JURISDICTION

The decree of the court below was entered on April 15, 1942 (R. 985). A petition for rehearing filed by petitioner was denied on June 29, 1942 (R. 993–1001). The petition for a writ of certiorari was filed on September 23, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the

Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board's findings that petitioner engaged in unfair labor practices in violation of Section 8 (1) and (3) of the Act by refusing to hire 27 employees[1] of its predecessor company, and refusing to reinstate 15 employees after a strike, are supported by substantial evidence.

The remaining questions urged by petitioner but which we think are not presented are:

2. Whether petitioner was responsible for the activities of a predecessor company.

3. Whether the Board improperly impeached its own witnesses.

4. Whether a strike of petitioner's employees resulting from petitioner's unfair labor practices was a "labor dispute" within the meaning of Section 2 (9) of the Act so that the strikers remained "employees."

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix.

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[1] The Board found (R. 75) that petitioner had discriminatorily refused to hire 27 employees of a predecessor company; the court below sustained the Board's findings as to 26, but remanded the cause to the Board as to the remaining employee for the taking of further testimony since it was doubtful whether he had been a member of the Union (R. 992). Hereinafter, we shall refer to the group as 27 employees.

## STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 17–94). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

On various occasions between May 1938, when the Union[3] began to organize its employees, and June 30, 1939, when it sold its wholesale bakery business to petitioner, officials of petitioner's predecessor company, Mountain City Mill Company (herein called the Mill Company) expressed hostility to the Union and threatened reprisals against its members (R. 22–26, 68–69; R. 273, 286, 606–607, 663–664, 804–805, 847). Superintendent Shauf, in particular, evidenced his animosity toward the Union. He threatened to "get rid of this union * * * one way or the other" (R. 27, 69; R. 494); expressed a similar intention on another occasion (R. 26, 69; R. 608–609); made specific inquiry whether an applicant for employment was pro-Union or anti-Union (R. 27, 69; R. 493–494); and expressly refused to employ another applicant because of his Union sympathies (R. 28, 69; R. 650).

[2] In the following statement, the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

[3] Bakery and Confectionery Workers' International Union of America, Local No. 25.

On June 30, 1939, petitioner [4] acquired the business (R. 21, 32–33; R. 226–227, 313–315, 379, 960–966). It retained the entire Mill Company supervisory staff and the office and sales personnel (R. 36, 66–67; R. 967, 971, 528–529). It followed a different course, however, with respect to the production employees, whom the Union had sought to organize. The Mill Company had in its employ 107 nonsupervisory production employees; 55 or 56 of these were members of Union, and the remaining 51 or 52 were not (R. 33, 66; R. 302, 238, 954–955, 967–969). Petitioner retained all 51 or 52 of the nonmembers (R. 34, 66; R. 967–971); but it refused to employ 27 of the Union members [5] (R. 34, 66; R. 346–347, 400–401, 967–971, Bd. Exhs. 12a–12bb [6]). Instead it replaced them with new and inexperienced nonunion employees (R. 34, 37, 66, 71; R. 443, 835, 852–860, 967–971).

The 27 Union applicants were considered, and rejected, by a "personnel committee" of which Superintendent Shauf (*supra,* p. 3) was chairman and which petitioner had authorized to decide whom to hire (R. 36–37, 69; R. 316–318, 400, 565).

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[4] Forty-eight percent of petitioner's stock is owned by two men who were the principal stockholders in the Mill Company (R. 36n., 29–30; R. 232–233, 946). One of them is president of petitioner (R. 35, 36; R. 227, 350).

[5] See note 1, p. 2, *supra.*

[6] In accordance with a stipulation in the court below, printing of these exhibits was omitted. The original exhibits are part of the transcript of record on file with the Clerk of this Court.

Admittedly, Shauf had in his possession a list of the Union members (R. 37, 71; R. 396, 400) and his recommendations for rejection were accepted in every case by the other Committee members and by petitioner (R. 37, 69, 71; R. 869, 347–348, 399–400, 530–531).

In each case petitioner asserted some failing in the rejected employee; for example, it assigned as causes a "peculiar disposition" (R. 38; Bd. Exh. 12a), a "loss of interest" (R. 39; Bd. Exh. 12b), "dissatisfaction" (R. 41; Bd. Exh. 12c), "talking about things that should not be discussed in the plant" (R. 45; Bd. Exh. 12g), "did not fit into the new company" (R. 43, 46, 49, 50; Bd. Exhs. 12e, 12d, 12m, 12w), and lack of "educational background" (R. 54; Bd. Exh. 12q, R. 565). The Board carefully reviewed the alleged disqualifications of the rejected applicants and concluded that the reasons assigned were not the motivating causes of the refusals to hire them (R. 38–66); it found that the true cause was petitioner's desire to destroy the Union's majority status and to discourage membership in the Union (R. 66–75).

The Board did not overlook the fact that petitioner had hired certain of the Union members, including the Union president, Phillips, and its secretary, Sutton (R. 67–68). But Phillips, because he feared, correctly, that many of the members would not get back their jobs, had urged that the Union be disbanded and that it "cooperate with

[petitioner's president] in anything that he wants done" (R. 31–32; R. 492, 628–629, 658). Sutton had threatened to cause trouble in the event of discrimination (R. 68; R. 630).

Petitioner was as hostile to the Union as the Mill Company had been. A foreman told a Union member that she would have to "choose" between "working with [petitioner]" and "being on the outside with the rest" (R. 34, 69; R. 732–733). Another supervisor asked a member who had been retained whether she "wasn't sorry" she had joined the Union (R. 34, 69; R. 832). Petitioner's president urged employees to discuss grievances with him individually (R. 35, 69; R. 832–833, 839–840).

On July 14, the Union called a strike in protest against the petitioner's failure to rehire the Union members (R. 75–76; R. 268–270). Fifteen of petitioner's employees joined the strike (R. 77; R. 306–307, 636, 661, 835, 838, 844–845). The strike proved unsuccessful; it lasted until October 25, when application for reinstatement of the strikers was made and refused (R. 76–77; R. 295–298, 958). The Board rejected petitioner's contention that the strikers had "quit" their employment (R. 77–80; R. 297, 309–310, 662, 958–959). It found that the strike was caused by petitioner's unfair labor practices and that therefore petitioner's failure to reinstate the strikers upon demand constituted discrimination in violation of Section 8 (3) (R.

80–82).[7] Independently of this, the Board found that the cause of petitioner's refusal to reinstate the strikers was its desire to discourage Union membership (R. 82–83).[8]

The Board concluded that petitioner refused to hire the 27 employees of the Mill Company and refused to reinstate the 15 striking employees because of their Union activities, in violation of Section 8 (3) of the Act (R. 75, 83, 88); and that by these refusals and by its antiunion statements (*supra*, p. 6) petitioner also violated Section 8 (1) (R. 75, 83, 88–89). The Board ordered petitioner to cease and desist from its unfair labor practices, to reinstate with back pay the employees against whom it had discriminated, and to post appropriate notices (R. 89–91).

On June 11, 1941, the Board petitioned the court below for enforcement of its order (R. 1–8). By its opinion and decree of April 15, 1942, the court enforced the Board's order in full except that it omitted a "work-relief" provision at the request of the Board, and remanded the couse in respect to one employee for further evidence concerning his

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[7] The authorities uniformly so hold. See, for example, the cases cited at R. 81, note 88.

[8] The Board pointed out that some other employees who had joined and then deserted the strike were taken back; that a member who was expelled from the Union was also taken back; and that some of the strikers who individually applied after the strike ended were rejected when, in response to petitioner's question, they reaffirmed their loyalty to the Union (R. 76–77, 82–83; R. 308, 310, 634–635, 872–873).

Union membership (R. 985–992). Petitioner's petition for rehearing was denied on June 29, 1942 (R. 993–1001).

ARGUMENT

1. Petitioner's principal contention (Pet. 14, 16–35, 38–69) is that the findings of discrimination with respect to the 27 Union applicants are without support in the evidence. The contention presents no question of general importance. Moreover, it is unsound. The refusal to hire almost half the Union employees while retaining all the non-Union employees,[9] the trivial reasons assigned in nearly all cases, the contemporaneous hiring of new and inexperienced non-Union workers, and the hostility of Superintendent Shauf toward the Union supply an adequate basis for the Board's conclusion. The Shauf committee was a "dam to self-organization at the source of supply" (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 185).

2. Petitioner states (Pet. 14, 21–23) that the Board held petitioner to be responsible for the ac-

[9] Compare *F. W. Woolworth Co.* v. *National Labor Relations Board*, 121 F. (2d) 658, 661–662 (C. C. A. 2); *National Labor Relations Board* v. *Bachelder*, 120 F. (2d) 574, 578 (C. C. A. 7), certiorari denied, 314 U. S. 647; *Montgomery Ward & Co.* v. *National Labor Relations Board*, 107 F. (2d) 555, 559 (C. C. A. 7); *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. (2d) 49, 53 (C. C. A. 8); *North Whittier Heights Citrus Assn.* v. *National Labor Relations Board*, 109 F. (2d) 76, 78–79 (C. C. A. 9), certiorari denied, 310 U. S. 632.

tivities of its predecessor, the Mill Company, and contends that this was error. But petitioner misinterprets the action of the Board. Each company was held responsible only for its own unfair labor practices, and the Board entered a separate order against the Mill Company based on the conduct in which it had engaged (R. 84, 91–92).[10] Insofar as that conduct also showed that Superintendent Shauf and other supervisors whom petitioner engaged were hostile to the Union, it was of course relevant to the issues in the present proceeding.

3. Petitioner contends (Pet. 14–15, 30–35) that it was error for the Board to "impeach" its "own witnesses." The witnesses to whom petitioner refers were officials and stockholders of petitioner (Pet. 30, R. 946), and the alleged "impeachment" consisted of calling witnesses who gave testimony conflicting with the testimony of the officers and stockholders. The short answer to the contention is that Section 10 (b) of the Act provides that "the rules of evidence prevailing in courts of law or equity shall not be controlling." Moreover, even in such courts, it is common practice to allow a party to call an adverse party and its agents without holding the party calling them bound by their

[10] The Mill Company consented to a decree enforcing the separate order against it before the present enforcement proceeding against petitioner was begun; consequently that order is not in issue here.

evidence. *E. g. Dravo* v. *Fabel,* 132 U. S. 487, 490; and see quotation at Pet. 31.[11]

4. Finally, petitioner contends (Pet. 13–14, 15, 35–38) that the Board's order with respect to the 15 strikers is improper. It argues that the refusal to hire the 27 Union applicants was not a "labor dispute" under Section 2 (9) (*infra,* p. 12), and that therefore the 15 strikers did not retain their "employee" status under Section 2 (3) (*infra,* p. 12) when they struck because of such refusal. The contention has no merit. The strike was plainly a "controversy concerning terms, tenure, or conditions of employment" within the meaning of Section 2 (9), for the strikers as Union members sought to protect themselves against the threat of discrimination implicit in the refusal to hire their fellow members among the former employees of the Mill Company. Cf. *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 185.[12] But even if the strike was not a "labor dispute," the strikers remained "employees" within Section 2 (3) because they ceased work as a result

[11] Even "impeachment" of an adverse party, in the strict sense, is expressly allowed by the Rules of Civil Procedure (1938, Rule 43 (b)) and by the modern rule in most states. 3 Wigmore on Evidence (3rd ed.), sec. 916; see American Law Institute, Code of Evidence, Proposed Final Draft, Rule 106.

[12] Even if the dispute be regarded solely as one between petitioner and the rejected applicants, it was nevertheless a "labor dispute" within Section 2 (9) for that section applies "regardless of whether the disputants stand in the proximate relation of employer and employee."

of petitioner's "unfair labor practice" in rejecting the other Union members. Moreover, even if petitioner's assertion that the strikers lost their "employee" status be accepted, a sufficient basis for the order exists in the Board's finding that the refusal to take them back at the end of the strike was discriminatory. *Phelps Dodge Corp.* v. *National Labor Relations Board, supra.*

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any question of general importance. The petition should therefore be denied.

Respectfully submitted.

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